SUPREME COURT U. S.

DEC 9 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~958~~ 70-38

FEDERAL POWER COMMISSION,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

LEON JAWORSKI
JEFFERSON D. GILLER
FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002

HARRY A. POTH, JR.
RICHARD M. MERRIMAN
REID & PRIEST
1701 "K" Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent

December, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement of the Case	2
Argument in Opposition	4
Conclusion	10

CITATIONS

Cases

Arkansas Power & Light Co. v. FPC, 368 F.2d 376 (8th Cir. 1966)	4
Cincinnati Gas & Electric Co. v. FPC, 376 F.2d 506 (6th Cir. 1967), cert. denied, 389 U.S. 842	4
Connecticut Light & Power Co. v. FPC, 324 U.S. 515 (1945)	6, 9
FPC v. Southern California Edison Co., 376 U.S. 205 (1964)	9
Indiana & Michigan Electric Co. v. FPC, 365 F.2d 180 (7th Cir. 1966), cert. denied, 385 U.S. 972	4
Jersey Central Power & Light Co. v. FPC, 319 U.S. 61 (1943)	6, 8, 9
Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414 (1952)	9
Public Service Company of Indiana v. FPC, 375 F.2d 100 (7th Cir. 1967), cert. denied, 387 U.S. 931	4

Statute

Federal Power Act §201(b), 49 Stat. 847 (16 U.S.C. §824(b))	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 958

FEDERAL POWER COMMISSION,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

An adequate reference to the opinions delivered in the court below and in the Federal Power Commission is made in the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

It is respectfully submitted that the following question, rather than the question urged by the Petitioner, is the one correctly here presented, in the light of the opinion of the Court of Appeals (Petition App. A, pp. 13-33):

Whether the Court of Appeals correctly held that the Federal Power Commission failed to carry its burden to prove that there had been a "transmission of electric energy *in* interstate commerce" to or from the facilities of Florida Power & Light Company (Respondent) so as to subject Respondent to the Commission's regulatory jurisdiction.

STATUTE INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

While a portion of the Statement presented by the Commission is argumentative in nature, being categorizations and inferences from the facts, rather than simply a statement of the facts themselves, it is otherwise accurate. However, the Statement omits the following facts about Respondent's business which Respondent deems relevant to a determination of the urgency for granting the Petition.

Respondent's facilities are not only located wholly in Florida, but substantially all of these are located in the southern portion of Florida, with about 75% of Respondent's electric load being located at the extreme southern end of the peninsula between West Palm Beach and Miami, approximately 400 miles south of the Georgia border. Respondent's sales are almost exclusively retail sales; it sells to only six customers at wholesale, these being local cooperatives. These wholesale sales accounted for less than 1% of Respondent's revenues from sales of electricity. Respondent owns no facilities which cross state lines, nor do any of the four other electric entities with which Respondent has connections own any facilities which cross state lines. Only one of these other entities, Florida

Power Corporation (Florida Corp) has connections at — but not across — the Florida-Georgia state line and regularly engages in the purchase and sale of electricity across this border.

The Commission's assertion of jurisdiction, and its attempt to prove interstate transmission of electric energy from or to Respondent, was based on a connection between Respondent and the Florida Corp system, and a connection between the Florida Corp system and utilities operating in Georgia. (Petition App. C, pp. 41-44). This interconnection between Respondent and Florida Corp is a 200-foot bus located 180 miles south of the Georgia state line. (Petition App. C, p. 56). Electric flows to and from this bus were the subject of considerable testimony. (Petition, p. 6).

The connections between Respondent and the other four Florida electric entities (including Florida Corp) constitute what is sometimes labeled the "Florida Pool". However, as the court below stated, it is not a "power pool". (Petition App. A, p. 30). These connections are for emergency purposes only and are not intended for regular sales or exchanges of power. (Petition App. D, p. 67). Respondent has no exchange arrangements with any electric company except the arrangement for emergency purposes with the said four Florida electric entities (Petition App. A, p. 17).

The Interconnected Systems Group described in the Petition is not an organized pool with which Respondent has any contractual obligation nor is the operation of Respondent's system dependent on the Interconnected Systems Group. Because of the unique peninsular location of the Respondent's system and the frequency and severity of lightning, storms and hurricanes, Respondent has always designed and operated its system in such a way that it is not and will not be dependent upon others to supply any part of its predictable load. (Petition App. D, p. 65).

The Commission's position is that it has proven interstate flow of electricity because (1) Respondent's connection with Florida Corp and Florida Corp's connection with others results in operations of systems outside the State of Florida and operations of Respondent "affecting" each other or (2), alternatively, its commingled method of tracing power, particularly through the 200-foot bus connecting Florida Corp and Respondent, demonstrated that interstate electricity moved into and out of Respondent's system. (Petition, pp. 5, 6).

ARGUMENT IN OPPOSITION

The Commission argues, as reasons for granting the writ, that the decision below (a) conflicts with those of other courts of appeal,[1] (b) leaves it with no way for determining its basic jurisdiction, and (c) will promote uncertainty and further litigation. These arguments will not stand close examination. What the Commission is really complaining about is that it must recognize that there are some limits on its jurisdiction where the language of the Power Act — giving the Commission jurisdiction over facilities for the transmission of electric energy "in" interstate commerce — clearly indicates that Congress did not purport to exercise its full constitutional authority over facilities which merely "affect" interstate commerce.

As to the alleged conflict between the decision below and those of four other courts of appeal, not only the two dissenting commissioners, but the court below concluded that there was no such conflict. The latter neither disagreed

[1] *Indiana & Michigan Electric Co.* v. *FPC,* 365 F.2d 180 (7th Cir.), cert. denied, 385 U.S. 972; *Arkansas Power & Light Co.* v. *FPC,* 368 F.2d 376 (8th Cir.); *Public Service Co. of Indiana* v. *FPC,* 375 F.2d 100 (7th Cir.), cert. denied. 387 U.S. 931; *Cincinnati Gas & Electric Co* v. *FPC,* 376 F.2d 506 (6th Cir.), cert. denied, 389 U.S. 842.

with nor declined to follow the other courts of appeal. To the contrary, the Fifth Circuit suggested several sound reasons for distinguishing the other cases.

First, those cases all dealt with electric companies which admittedly received electricity transmitted in interstate commerce and were thus subject to the jurisdiction of the Commission. The only question in those cases was whether or not a particular sale or group of sales made by a utility which admittedly had interstate electricity in its system (and in at least two of the cases, admittedly had delivered such interstate electricity to other customers) was subject to the wholesale rate regulation jurisdiction of the Commission. And the Fifth Circuit was in full agreement with the Eighth Circuit in distinguishing between the kinds of evidence required to establish rate jurisdiction over wholesale sales and plenary jurisdiction over a utility:

> "We agree with the court in *Arkansas Power & Light*, supra, at 383, n.8, that establishing wholesale rate jurisdiction over an electric company which is a public utility within the Act is a different matter from establishing plenary jurisdiction over a company based on interstate transmission." (Petition App. A, p. 29).

Second, the effect of interconnection on the question of the interstate transmission of electric energy was not in issue in the other cases. Since interstate electricity was admittedly in the four systems involved, the courts were not called upon to, nor did they, pass upon the Commission's primary contention here that interstate flow of electricity is established by the "effect" one interconnected system has on the other.

Third, each of the companies involved in the allegedly conflicting cases was a participant in an integrated multi-state power pool and engaged in substantial and continuous sales and exchanges of power with members of the pool

located in other states. It was in that context, and not because of any scientific advances since the adoption of the Power Act, that the courts approved the Commission's commingling theory of tracing electricity. The court below does not in any way disparage the use of that theory in such a context. As stated above, Respondent did not participate in such a "power pool" but was merely connected to Florida Corp. The position of the court below with respect to the need for tracing through the bus connecting Respondent and Florida Corp is the same as that of this Court in *Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U.S. 61. In each case, the critical inquiry was directed at electric flows through a bus; in each the Court held, "Mere connection determines nothing" (319 U.S. at 72); and in each it was necessary, when attempting to establish plenary jurisdiction over the company, to trace flows to and through the bus and not merely to show connections to the bus.

The commingling tracing theory urged by the Commission requires that the 200-foot bus be treated as a "point, a tank or a reservoir" in an electrical system. (Petition, p. 6, n.1 and App. D, pp. 81-82). This theory assumes 200 feet to be a point, which it is not; or assumes there can be a tank or reservoir of electricity, which is an impossibility since electricity cannot be stored. The Commission's theory is thus a legalistic rather than an engineering or scientific one, and the use of such legalistic tests in determining electrical flow was condemned by this Court in *Connecticut Light and Power Co.* v. *F.P.C.*, 324 U.S. 515 at 529.

Finally, the lower court sets out several considerations as to why one test may be used in determining rate jurisdiction over wholesale sales of a company admittedly subject to the Commission's jurisdiction and a different test be employed when the question is whether the Commission has jurisdiction over a company in the first place:

> "A consideration in the wholesale sale case is the seeming irrationality of allowing Commission jurisdiction over wholesale sales to which experts can trace some out of state energy, but not over those to which it might be impossible to trace interstate power, when it is obvious that there is interstate power in substantial portions of the utility's system. *Cf. Arkansas Power & Light, supra.* Another consideration is the seeming irrationality of a public utility with interstate electric energy flowing in its system escaping FPC jurisdiction over wholesale sales because of impossibility of proof arising from the inadequacy of instruments used by the utility itself. *Cf. Indiana & Michigan, supra.* These considerations have little application to the problems of federalism and reservations of power to the states imposed by the instant case, where the issue is one of whether FPL is a public utility at all, measured under tests articulated by the Congress and the courts in terms of actual transmissions of interstate energy." (Petition App. A, pp. 29-30).

While the Commission now characterizes as "untenable" the distinction drawn by the Fifth Circuit, it fails to criticize, or even comment upon, the considerations underlying the court's distinction.[2]

---

[2] Respondent submits that if this straight jurisdiction case imposes a greater burden on the Commission than the "power pool" wholesale sales case, this difference is entirely proper in view of the greater consequences resulting from the declaration of a "public utility" status. Imposing rate regulation over one or more sales does not have the impact that initially bringing an electric company under Commission jurisdiction has. State regulation is wholly supplanted by federal regulation; a change in the accounting and property records system may be required (as here); reporting requirements are broadened; approval is required for proposed offerings of stock, mortgage bonds, notes and other financings, as well as mergers, acquisitions, and other corporate transfers; interconnections and sales of power may be compelled for reasons other than the interests of local consumers — all of this in addition to rate regulation over wholesale sales.

The Commission next asserts that the decision of the court below "leaves the Commission with no adequate basis for determining the scope of its own jurisdiction." This is not a reasonable statement in the light of the 25-year guidance offered by this Court in the *Jersey Central* case which involved a physical arrangement similar to that of the present case as described above. The Commission in that case was able to trace interstate flows into and out of the system under question. 319 U.S. at 65, 66. If the Commission, under the technology involved at the time of the investigation in the *Jersey Central* case (1937 and 1938) could trace interstate flows, it would seem that if interstate flows into or out of Respondent's system had actually existed in the present case, the Commission could have traced it. The Commission's problem was not that it had "a burden that is impossible to meet in the present state of technical knowledge." (Petition, p. 11). The Commission's problem was that the facts it gathered for the case left Respondent beyond its jurisdictional grasp. Its own Examiner found that a conventional tracing method previously used by the Commission, and here adopted by Respondent in presenting its case, showed there was no flow of interstate electrical energy into or out of Respondent's system. (Petition App. D, p. 80).

The Commission also complains that "considerable uncertainty" will prevail "with a likelihood of substantial further jurisdictional litigation." This anxiety on the part of the Commission is expressed without any substantiation by supportive facts or even by examples of situations in which this "uncertainty" might appear. One reason for this lack of documentation is that the situation with Respondent is rather special. The geographical arrangement of Respondent's facilities in the peninsula of Florida is of course not duplicated anywhere else in the country. Actually this phase

of jurisdiction is really not an issue of great magnitude. It is basically a settled area of the law, as evidenced by the fact that only four Supreme Court cases have directly dealt with issues of jurisdiction over a company by virtue of its interstate transmissions.[3] While the Commission may face the prospect of from time to time having to determine whether it may regulate certain sales of a company already subject to its jurisdiction, it may do so in reliance on the four other court of appeals decisions which were not disturbed by the decision below.

Respondent submits that between the *Jersey Central* line of cases, of which this is one, and the "power pool" cases, the jurisdiction of the Commission is quite well defined, and the "substantial further jurisdictional litigation" is a spectre without substance.[4] It is respectfully submitted that the Commission's desire for symmetry of the tests to be used to determine jurisdiction in these two distinct situations is an academic one and one which need not, absent a more convincing demonstration by the Commission, involve this Court in what is essentially a factual, albiet highly technical, inquiry.

In the final paragraph of its petition, the Commission again reveals the real basis of its complaint: Respondent should be subject to Commission jurisdiction because it *affects* interstate commerce by its operation. Whether Respondent does in fact affect interstate commerce is immaterial here, for Respondent is subject to regulation by the Commission only if it transmits electrical energy "*in* interstate commerce".[5] What the Commission wishes from

---

[3] *Jersey Central Power & Light Co.* v. *FPC*, supra; *Connecticut Light & Power Co.* v. *FPC*, supra; *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414; and *FPC* v. *Southern California Edison Co.*, 376 U.S. 205.

[4] According to the Commission's Annual Reports no electric jurisdiction cases have been initiated since 1966.

[5] Section 201(b) of the Federal Power Act, 49 Stat. 847 (16 U.S.C. §824(b)).

this Court is legislative revision, not judicial application. The court below simply applied the statutory standard and found the proof wanting. The Commission's complaint, being legislative in nature, can only be properly considered by Congress.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, it appears that there are no special and important reasons for the Court to review this case, and accordingly Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LEON JAWORSKI
JEFFERSON D. GILLER
FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI
800 Bank of the Southwest
Building
Houston, Texas 77002

HARRY A. POTH, JR.
RICHARD M. MERRIMAN
REID & PRIEST
1701 "K" Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent

PROOF OF SERVICE

Service of this Brief for the Respondent in Opposition has been made upon the Federal Power Commission by mailing copies hereof airmail postage prepaid to Mr. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530 this 7th day of December, 1970.

Original Signed By
Leon Jaworski
Attorney for Respondent